

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 02-1577
)
 FITZROY SALESMAN,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 19, 2002, in Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Melinda L. McNichols, Esquire
Miami-Dade County School Board
1450 Northeast Second Avenue
Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman, Esquire
Herdman & Sakellarides, P.A.
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STATEMENT OF THE ISSUE

Whether the Respondent, Fitzroy Salesman, should be terminated from his employment with the Miami-Dade County School District.

PRELIMINARY STATEMENT

On April 17, 2002, the Miami-Dade County School Board (Petitioner or School Board) took action to suspend and initiate dismissal proceedings against the Respondent, Fitzroy Salesman. The basis for the action was alleged misconduct in office, violation of the Code of Ethics and the Principles of Professional Conduct of the Education Profession in Florida, as well as an alleged violation of School Board Rule 6Gx13-4A-1.21, Responsibilities and Duties. The Respondent timely challenged the proposed dismissal by letter dated April 15, 2002.

The matter was then forwarded to the Division of Administrative Hearings for formal proceedings and promptly scheduled for hearing. Each party requested and was granted a continuance in the cause. The matter was ultimately heard on November 19, 2002.

At the hearing, the Petitioner presented testimony from six witnesses. The Petitioner's Exhibits numbered 1-10 were received in evidence. The Respondent testified in his own behalf and offered testimony from two other witnesses.

The Transcript of the proceeding was filed with the Division of Administrative Hearings on January 13, 2003. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this order.

FINDINGS OF FACT

1. The Petitioner is charged with the duty to operate, control, and supervise all public schools within the Miami-Dade County School District. As such, the employment of school personnel is encompassed among its myriad of duties. Further, the School Board is charged with the discipline of its employees.

2. The Petitioner employed the Respondent on or about August 28, 1988. The Respondent was employed pursuant to a professional service contract. The Respondent was continuously employed as a full-time teacher assigned to Miami Lakes Educational Center (the Center). Throughout most of his employment, the Respondent's primary job assignment was related to his area of expertise: welding. Prior to the instant case, the Respondent has never been the subject of a disciplinary proceeding.

3. Due to a decrease in enrollment for welding classes (such that a full-time welding position was not required), the Respondent was assigned responsibilities as a substitute teacher for other programs at the Center.

4. Specific to the allegations of this case, the Respondent, on September 24, 25, 26, 27, 28, 29, and October 1, 2, 3, and 4, 2001, was assigned to serve as a

substitute teacher in the Television Production Program at the Center.

5. While being supervised by the Respondent, at least ten students participated in the production of a program depicting inappropriate activities. For example, the students were recorded using profanity, mimicking sex acts, and discussing "getting high." The students talked openly and without interruption or direction from the Respondent. During part of the tape, the Respondent stood within the glassed production area next to the studio set. Occupants of that room are able to see and hear the activities on the set.

6. The Respondent knew or should have known what the students were doing as he was responsible for the class. Further, at one point, the Respondent appeared on camera and stated, "ain't that some shit."

7. The Respondent was given an inadequate lesson plan for the days he substituted in the Television Production Program but did not seek assistance from administrators or the department head. Such assistance is readily available to any substitute teacher who advises he is in need of additional materials or plans.

8. Further, the Respondent did not report the activities of the students. Specifically, he did not refer students to the office based upon their inappropriate activities.

9. The Respondent does not deny that the students engaged in the activities described. He maintains that he was inadequately trained or prepared to lead the class.

10. On or about October 19, 2001, an administrator at the Center discovered the tapes depicting inappropriate conduct. At that time the Respondent was reassigned to another location.

11. Based upon the Respondent's failure to properly monitor the class, his effectiveness as a teacher has been impaired.

12. On January 13, 2002, a conference-for-the record (CFR) was conducted with the Respondent. At the CFR, the Respondent was advised of concerns regarding the described conduct during the time he served as substitute teacher for the Television Production Program.

13. On January 15, 2002, ten students from the television production class were suspended from school. The suspensions stemmed from their activities depicted in the videos described above.

14. On March 19, 2002, the Respondent attended a meeting with the School Board's Office of Professional Standards. At that time the Respondent was advised that the School District would seek dismissal proceedings.

15. On April 17, 2002, the School Board took action to initiate dismissal proceedings against the Respondent based upon the activities that had occurred in the Television Production Program during the Respondent's time as substitute.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569 and 120.57, Florida Statutes.

17. Section 231.36, Florida Statutes, provides, in pertinent part:

(1)(a) Each person employed as a member of the instructional staff in any district school system shall be properly certificated pursuant to s. 231.17 or s. 231.1726 or employed pursuant to s. 231.1725 and shall be entitled to and shall receive a written contract as specified in chapter 230. All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

* * *

(6)(a) Any member of the instructional staff, excluding an employee specified in subsection (4), may be suspended or dismissed at any time during the term of the contract for just cause as provided in paragraph (1)(a). The district school

board must notify the employee in writing whenever charges are made against the employee and may suspend such person without pay; but, if the charges are not sustained, the employee shall be immediately reinstated, and his or her back salary shall be paid. If the employee wishes to contest the charges, the employee must, within 15 days after receipt of the written notice, submit a written request for a hearing. Such hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

1. A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of §. 120.569 and 120.57. A majority vote of the membership of the district school board shall be required to sustain the superintendent of schools' recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or
2. A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

Any such decision adverse to the employee may be appealed by the employee pursuant to s. 120.68, provided such appeal is filed within 30 days after the decision of the district school board.

18. "Misconduct in office" is defined by rule. Rule 6B-4.009(3), Florida Administrative Code, provides:

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

19. As an educator, the Respondent is required to strive to achieve the highest degree of ethical conduct. Rule 6B-1.001, Florida Administrative Code.

20. Additionally, Miami-Dade County School Board Rule 6Gx13-4A-1.21 requires:

All persons employed by The School Board of Miami-Dade County, Florida, are representatives of the Miami-Dade County Public Schools. As such, they are expected to conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system. Unseemly conduct or the use of abusive and/or profane language in the workplace is expressly prohibited.

21. In this case, the School Board bears the burden of proof to establish the violation alleged. It has met that burden. As set forth in the Pre-Hearing Stipulation, the

parties have agreed that the Respondent was employed as the substitute teacher for the Television Production Program on the dates identified in the record. The parties do not agree that the Respondent should be disciplined for the activities that occurred in the class. Nor do the parties agree that the Respondent knew the details of the students' video.

Nevertheless, the Petitioner has established by a preponderance of the evidence that the Respondent, as the teacher for the class, knew or should have known the activities of the class.

22. The Petitioner has requested that the Notice of Charges be amended to conform to the evidence presented. While unnecessary, such request is granted.

23. Activities conducted in the Television Production Program during the Respondent's time there resulted in the suspension of ten students.

24. The Respondent cannot dispute the existence of the tapes or the language and images shown therein. Instead, the Respondent maintains he was placed in a class setting for which he was ill prepared. If so, he did not report the matter to any appropriate authority. Instead, students had an uncensored opportunity to video tape inappropriate subject matter with inappropriate language.

25. The Respondent appeared on camera for one scene and used profane language. The School Board rule expressly prohibits such conduct.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Miami-Dade County School Board affirm the suspension of the Respondent and dismiss him from employment with the School District.

DONE AND ENTERED this 31st day of March 2003, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.